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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	COUNSEL:
THERESA PICKERING, Applicant,	Iain N. MacNair, For the Applicant
- and -	Andrew P. Loewen, For the Respondent, Precision Joint Sealing Inc.
THE GOVERNMENT OF MANITOBA and PRECISION JOINT SEALING INC., Respondents.	Sean D. Boyd, For the Respondent, The Government of Manitoba
	Judgment delivered: February 19, 2008

SIMONSEN J.

[1] The applicant seeks leave under *The Limitation of Actions Act*, C.C.S.M. c. L150 ("the *Act* ") to commence an action against the respondent, Precision Joint Sealing Inc. ("PJS"), notwithstanding the expiry of the limitation period. The proposed action is a claim for damages for personal injuries allegedly sustained as a result of an incident said to have occurred while Ms Pickering was rollerblading in Bird's Hill Provincial Park ("the Park") on August 1, 2004 ("the incident"). Specifically, she alleges that one of the wheels of her rollerblades

adhered to material used to fill cracks in the surface of a path, causing her to fall and sustain injury.

[2] The issue is whether the applicant has met the criteria in s. 14 of the *Act* such that she should be granted leave to commence an action against PJS.

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BACKGROUND

[3] On October 7, 2004, the applicant first retained Mr. MacNair's law firm (Mr. MacNair argued this application on her behalf) in connection with the incident. Based on the evidence before me, it appears that, at least from July, 2006 to October, 2006, the applicant's file was handled by a lawyer at the firm other than Mr. MacNair.

[4] On July 17, 2006, Ms Pickering commenced an action, in Queen's Bench File No. CI-06-01-47934, against the respondent, The Government of Manitoba ("the Government"), for damages arising from the incident. The claim was brought on the basis that the Government was the owner and occupier of the Park.

[5] The statement of claim contains the following allegations:

> 7. At all material times, the Crown employed individuals in the Department of Conservation who were responsible for the supervision and maintenance of the roads and paths in the park. No other individuals or entities were responsible for the supervision and maintenance of the roads and paths in the park. Specifically, the Crown did not engage the services of an independent contractor to be responsible for the supervision and maintenance.
>
> 8. In the alternative, the Plaintiff states that in the event the Crown did engage the services of an independent contractor to be responsible for the supervision and maintenance of the roads and paths in the park, the Crown did not exercise reasonable care in the selection or supervision of

> the independent contractor who was to be responsible for the supervision and maintenance.

[6] The statement of claim was served on the Government on October 6, 2006.

[7] On October 11, 2006, Crown counsel contacted counsel for the applicant to request an extension of time for filing a statement of defence. Counsel for Ms Pickering then wrote a letter to Crown counsel inquiring as to whether an independent entity was involved in the maintenance of the path. By letter dated October 18, 2006, Crown counsel responded that an independent contractor had been retained to conduct patching of the path.

[8] On November 7, 2006, counsel for the applicant asked Crown counsel to disclose the identity of the independent contractor. By letter dated November 17, 2006, Crown counsel indicated that PJS was the independent contractor who had been retained by the Department of Conservation to seal the cracks in question.

[9] On January 17, 2007, Ms Pickering filed her notice of application seeking leave to commence action against PJS. The proposed claim alleges that PJS:

(a) failed to properly repair, maintain and/or inspect the path;

(b) allowed the public access to an unsafe area; and

(c) failed to give proper or any warning of the unsafe area.

[10] The notice of application seeks both leave to commence a new action and leave to add PJS as a defendant to the existing action against the Government; it refers to s. 14 of the *Act* as well as Queen's Bench Rules 5.03, 26.01 and 26.02

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which deal with joinder of parties and amendment of pleadings. However, during submissions, counsel for Ms Pickering indicated that he is pursuing only the application under s. 14 for leave to commence a new action.

[11] Prior to being served with the notice of application, PJS was unaware of the incident or the applicant's alleged injuries.

[12] The Government takes no position with respect to Ms Pickering's application.

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ANALYSIS AND DECISION

[13] It is common ground that the limitation period governing the applicant's claim for damages for personal injury arising from the incident is two years, and that the limitation period expired on August 1, 2006 (s. 2(1)(e) of the *Act*).

[14] Applications for leave to commence an action after expiry of the limitation period are governed by ss. 14(1), 14(2) and 15(2) of the *Act*, which provide as follows:

> **Extension of time in certain cases**
> 14(1) Notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between
>
> > (a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and
> >
> > (b) the date on which the application was made to the court for leave.
>
> **Effect of leave**
> 14(2) Subject to subsections (3) and (4), no provision of this Act or of any other Act of the Legislature limiting the time for beginning an

action affords a defence to an action if the court either before or after the beginning of the action grants leave under this section to begin or to continue the action.

Evidence required on application
15(2) Where an application is made under section 14 to begin or to continue an action, the court shall not grant leave in respect of the action unless, on evidence adduced by or on behalf of the claimant, it appears to the court that, if the action were brought forthwith or were continued, that evidence would, in the absence of any evidence to the contrary, be sufficient to establish the cause of action on which the action is to be or was founded apart from any defence based on a provision of this Act or of any other Act of the Legislature limiting the time for beginning the action.

[15] Section 14 must be read in conjunction with ss. 20(2), (3) and (4):

Reference to material facts
20(2) In this Part any reference to a material fact relating to a cause of action is a reference to any one or more of the following, that is to say:

(a) The fact that injuries or damages resulted from an act or omission.
(b) The nature or extent of any injuries or damages resulting from an act or omission.
(c) The fact that injuries or damages so resulting were attributable to an act or omission or the extent to which the injuries or damages were attributable to the act or omission.
(d) The identity of a person performing an act or omitting to perform any act, duty, function or obligation.
(e) The fact that a person performed an act or omitted to perform an act, duty, function or obligation as a result of which a person suffered injury or damage or a right accrued to a person.

Nature of material facts
20(3) For the purposes of this Part, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a person of his intelligence, education and experience, knowing those facts and having obtained appropriate advice in respect of them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence based on a provision of this Act or any other Act of the Legislature limiting the time for bringing an action, an action would have a reasonable prospect of succeeding and resulting in an award of damages or remedy sufficient to justify the bringing of the actions.

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Where facts deemed to be outside knowledge
20(4) Subject to subsection (5), for the purposes of this Part, a fact shall, at any time, be taken not to have been known by a person, actually or constructively if

(a) he did not then know that fact;
(b) in so far as that fact was capable of being ascertained by him, he had taken all actions that a person of his intelligence, education and experience would reasonably have taken before that time for the purpose of ascertaining the fact; and
(c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, the fact might have been ascertained or inferred, he had taken all actions that a person of his intelligence, education and experience would reasonably have taken before that time for the purpose of obtaining appropriate advice with respect to the circumstances.

[16] "Appropriate advice" is defined in s. 20(1) as follows:

Definitions
20(1) In this Part

"appropriate advice" in relation to any fact or circumstance means the advice of competent persons qualified, in their respective spheres, to advise on the professional or technical aspects of that fact or that circumstance, as the case may be;

[17] The first requirement of the legislation is prescribed by s. 15(2). The authorities provide that, in order to meet this requirement, an applicant must prove that he or she has a cause of action which has a reasonable chance of success and that this involves more than simply disclosing a cause of action sufficient to successfully resist an application to strike out a statement of claim. It must be shown that there is some realistic prospect that the action will succeed (***A.J. v. Cairnie Estate***, [1993] M.J. No. 351 (C.A.) (QL) at para. 45). During submissions, neither counsel addressed this point; counsel for PJS did not take the position that s. 15(2) had not been met. Because I am not satisfied, for the reasons that follow, that Ms Pickering has met the other criteria of s. 14, I

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need not decide whether she has satisfied the evidentiary requirement of s. 15(2). However, based on the evidence before me, I have a genuine concern as to whether this requirement has been met. The only evidence in support of the proposed claim is that one of the applicant's rollerblade wheels adhered to material used to patch a crack and that PJS was the contractor retained to do the patching. There is no evidence of the kind that might be used to establish that the proposed action has a reasonable prospect of success, such as evidence that the patching was substandard or that PJS was negligent.

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[18] The second requirement of s. 14 is found in s. 14(1) itself. That is, the applicant must adduce evidence sufficient to satisfy the court that the material fact upon which the proposed action is based is not one which she ought to have known about earlier. Evidence that she ought not to have known the material fact at some point prior to the 12-month period preceding the application must be provided (***Einarsson et al. v. Adi's Video Shop et al.*** [1992] M.J. No. 42 (C.A.) (QL), (1992), 76 Man.R. (2d) 218 at para. 13 and ***Johnson v. Johnson*** 2001 MBCA 203, [2001] M.J. No. 542 (QL) at para. 12). The effect of s. 20(4) is to "place a positive obligation upon the applicant to demonstrate that she took all reasonable steps under the circumstances, including the taking of appropriate advice, to ascertain the facts necessary to ground the cause of action" (***Johnson***, at para. 14).

[19] Although the applicant has not brought a motion under Queen's Bench Rules 5.03, 26.01 and 26.02 to amend the existing statement of claim to add PJS

as a defendant, counsel for PJS nonetheless submits that the cases decided under these rules are relevant to this application in that the courts have not allowed such amendments where the plaintiff's lawyer did not take reasonable steps to identify, or made a conscious decision not to commence action against the proposed defendant prior to the limitation period (***Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.***, [1998] M.J. No. 396 (Q.B.) (QL), ***Hackett v. Ginther*** (1986), 26 D.L.R. (4th) 106 (Sask. C.A.), ***Lloyd v. Clark***, [2006] O.J. No. 5004 (S.C.J.) (QL), ***Moran v. McIntosh*** [2000] M.J. No. 337 (Q.B.) (QL), (2000), 147 Man.R. (2d) 251). Similarly, counsel for PJS argues that, on an application brought under the *Act*, the court should not grant leave to allow the commencement of an action where reasonable steps have not been taken to determine the proper parties to the suit.

[20] I now turn to a consideration of the criteria of s. 14(1) of the *Act* in the context of the present case. Counsel for PJS does not dispute that his client's involvement as an independent contractor constitutes "a material fact of a decisive character". It is also not disputed that this fact was outside Ms Pickering's actual knowledge prior to her lawyer receiving advice from Crown counsel on October 18, 2006 about the involvement of an independent contractor and on November 17, 2006 about the involvement of PJS in particular.

[21] The issue is whether the applicant ought to have known this fact more than 12 months prior to filing her application for leave. Ms Pickering's lawyer argues that, though no specific steps were taken prior to expiry of the limitation

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period to ascertain whether an independent contractor was involved, this approach was reasonable in the circumstances. That is, this is not a situation where it would have been apparent that an independent contractor was involved; the Government does much of its own maintenance and repair work. Further, he points out that information about the involvement of PJS could not have been obtained from an independent source. Rather, any information about the involvement of others was solely within the knowledge of the Government and the Government had no obligation to provide this information to the applicant until a statement of claim had been issued.

[22] Counsel for PJS submits that Ms Pickering's lawyer had conduct of her file for 22 months, from when he was first retained in October 2004 until expiry of the limitation period in August 2006, and that there is no evidence of reasonable, or indeed any steps being taken, inquiries made or searches conducted by Ms Pickering's lawyer during this time to ascertain whether an independent contractor was involved, or the name of any such contractor.

[23] Counsel for PJS also argues that the wording of Ms Pickering's statement of claim against the Government makes it clear that her lawyer contemplated the possible involvement of an independent contractor but chose to focus on the liability of the Government, in part, for allegedly failing to adequately supervise that contractor. Counsel for PJS contends that the *Act* was not intended to remedy such conscious decisions (***Steffensen v. Canadian Tire Corp.*** [1996] M.J. No. 197 (Q.B.) (QL), 109 Man.R. (2d) 143 at para. 31).

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[24] In response, counsel for the applicant says that the wording of the statement of claim is simply broad, inclusive language, used out of an abundance of caution and is not indicative of any real belief that an independent contractor was involved. In the alternative, counsel for Ms Pickering says that the date of issuance of the statement of claim is the earliest date upon which it can be said that the applicant ought to have known of the involvement of an independent contractor, and that the application for leave was brought within 12 months of the statement of claim being filed.

[25] In assessing whether the applicant has taken reasonable steps to determine the material facts of a decisive character, I have found two cases particularly instructive. In ***McCormick Estate v. Morrison***, [1970] M.J. No. 66 (Q.B.) (QL), (1970), 73 W.W.R. 86, Tritschler C.J.Q.B., in deciding whether leave ought to be granted to commence an action outside the limitation period, considered the reasonableness of investigations made by the applicant's lawyer for the purpose of determining the proper parties to the suit. In that case, a statement of claim had been filed against both the operator of the vehicle in which the plaintiff had been a passenger and the distributor and manufacturer of the tires on that vehicle, which were alleged to be defective. The party initially named as the manufacturer of the tires was Firestone Tire and Rubber Company of Canada Limited. Shortly after the accident, at an inquest, the driver had testified that the tires were "Firestone" and he identified where he had purchased them. Later, at an examination for discovery, the driver testified that

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the tires were of a different brand, as a result of which the applicant sought leave to commence action against that manufacturer. Although the court was dealing with an earlier version of the extension provisions under the *Act*, the basis upon which the court dismissed the application is relevant here. At para. 29, the court stated:

> Whatever the material facts of a decisive character may be or be supposed to be, they were capable of being ascertained or the supposition shown to be unfounded or incapable of proof. The test is not what Morrison said at the inquest, but what investigation plaintiff made. The circumstances called for enquiries from several sources. I think it is not putting the matter too strongly to say that plaintiff has not yet made any investigation into the fact of tire brand or supposed tire defect. Certainly, sufficient enquiries have not been made.

[26] Similarly, in ***Santangelo v. Gibbs***, [1998] M.J. No. 112 (Q.B.) (QL), the issue of whether counsel had taken reasonable steps was central to the judge's determination as to whether leave should be granted to allow the applicant to commence an action after expiry of the limitation period. In ***Santangelo***, the applicant had been involved in three motor vehicle accidents. After expiry of the limitation period for the third accident, the applicant made inquiries about the accident which led her to learn for the first time of the involvement of a vehicle operated by a third party, and that the driver of this vehicle may have been partially responsible for the accident. Thereafter, in discussions with the defendant's insurer in connection with the first accident, the insurer took the position that the third accident had aggravated her injuries. The applicant then brought her application for leave to commence action against the third party driver. In dismissing the application, Schulman J. stated as follows:

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> ¶16 ... If the applicant's representative had obtained the police report, he would have learned of the involvement of the van Hoek vehicle. Had he asked the M.P.I.C. adjuster whether M.P.I.C. had identified the vehicle, the adjuster would have disclosed that the identification had been made and provided the name of the owner and driver of the vehicle. In these circumstances, I find that the applicant ought to have known these material facts before the limitation period expired. Of course, if the M.P.I.C. adjuster had refused to provide the names of the owner and driver of the van Hoek vehicle to the applicant's representative, the applicant's case for an extension of time would have been stronger. However, as the representative failed to make the inquiries earlier, the applicant has failed to satisfy the third prerequisite of obtaining the extension of time.

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[27] In the case before me, there is no evidence of inquiries being made by the applicant's lawyer despite the fact that, in my view, he should have contemplated, right from the outset, the possible involvement of an independent contractor. This is not like the situation in ***Ngo v. Winnipeg (City)***, 2000 MBQB 21, [2000] M.J. No. 173 (QL) where the statement of defence made no mention of third parties and information subsequently obtained on examination for discovery led the applicant to conclude that a third party was involved. In this case, no such pleading was filed by the Government and relied upon by the applicant. I am satisfied that it would have been reasonable for the applicant's lawyer to have considered the possibility that a third party had been retained to do repair work for the Government. Indeed, this is essentially acknowledged by the language of the statement of claim against the Government. As well, this possibility should have been acted upon by the lawyer, at least to the extent of making an inquiry of the Government. This should have been done within a reasonable time after the lawyer's initial retainer, and certainly within the

limitation period and at a point prior to the 12 months preceding the filing of the notice of application.

[28] Therefore, I am not satisfied that the applicant, with appropriate advice, took reasonable steps to ascertain whether there was involvement on the part of an independent contractor and the name of any such contractor. As such, the involvement of PJS is not a fact deemed to be outside her knowledge, because ss. 20(4)(c) is not met. Nor am I satisfied that the applicant has proved that she ought not to have known about PJS's involvement within the limitation period or at some point prior to the 12-month period preceding her application. To the contrary, there is evidence upon which I infer that, had the applicant's lawyer made an inquiry of the Government within a reasonable time after being retained, he would have been advised of the involvement of PJS. I draw this conclusion on the basis that the Government promptly provided this information when asked in the fall of 2006.

[29] For the above reasons, I dismiss Ms Pickering's application.

[30] Counsel may speak to costs if they cannot agree.

_______________________J.

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